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NO. 35733-0-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

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DIVISION II
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STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

DOT FOODS, INC.,

Appellant,

v.

DEPARTMENT OF REVENUE, STATE OF WASHINGTON,

Respondent.

**RESPONDENT DEPARTMENT OF REVENUE'S ANSWER TO
MEMORANDUM OF AMICUS CURIAE URM STORES, INC.**

ROBERT M. MCKENNA
Attorney General

CAMERON G. COMFORT
Sr. Assistant Attorney General
WSBA No. 15188
P.O. Box 40123
Olympia WA 98504-0123
(360) 664-9429

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I. INTRODUCTION

This appeal involves the scope of RCW 82.04.423, a business and occupation (B&O) tax exemption for out-of-state direct sellers.¹ The argument of Amicus Curiae URM Stores, Inc. (URM), is flawed. Like Dot Foods, URM fails to read RCW 82.04.423 as a whole and give effect to all of the words used in the statute.

URM asks this Court to construe RCW 82.04.423 in a manner that ignores and renders meaningless many of the statute's requirements. As URM interprets the direct seller's exemption, the statute's repeated "in the home or otherwise in a permanent retail establishment" requirement² is

¹ RCW 82.04.423 exempts certain qualifying out-of-state direct sellers from B&O tax "in respect to gross income derived from the business of making sales at wholesale or retail . . ." An out-of-state seller qualifies for the direct seller's exemption if, among other requirements, it

[m]akes sales in this state exclusively to or through a direct seller's representative . . . who buys consumer products . . . for resale, by the buyer or any other person, in the home or otherwise than in a permanent retail establishment, . . . or who sells, or solicits the sale of consumer products in the home or otherwise than in a permanent retail establishment.

RCW 82.04.423(1)(d) and (2) (emphasis added). In addition, subsections (2)(a) and (2)(b) of the statute require that:

(a) Substantially all of the remuneration paid to [the direct seller's representative], whether or not paid in cash, for the performance of services described in this subsection is directly related to sales or other output, including the performance of services, rather than the number of hours worked; and

(b) The services performed by the [direct seller's representative] are performed pursuant to a written contract between such [representative] and the [direct seller] and such contract provides that the [representative] will not be treated as an employee with respect to such purposes for federal tax purposes.

² RCW 82.04.423(2).

met, as well as the “or any other person” restriction,³ even if the out-of-state seller’s products are sold at retail in permanent retail establishments. In URM’s view, the “[m]akes sales in this state exclusively to or through a direct seller’s representative . . . who buys consumer products . . . for resale, . . . or who sells, or solicits the sale of, consumer products . . .” requirement⁴ is met so long as the out-of-state seller sells a nominal amount of consumer products in this state to or through its representative. And, finally, according to URM, the requirement that the direct seller and its representative must enter into a written contract providing that the representative “will not be treated as an employee . . . for federal tax purposes”⁵ is met even if the out-of-state seller’s representative is a corporation and such requirement cannot be as applied to it.

Unbridled from the actual requirements of RCW 82.04.423, URM feels free to urge this Court to greatly expand the scope of the direct seller’s exemption, contrary to the rule that tax exemptions are to be narrowly construed. Stroh Brewery Co. v. Dep’t of Revenue, 104 Wn. App. 235, 240, 241, 15 P.3d 692 (2001) (“we construe tax exemptions narrowly”; “we must resolve ambiguity in favor of taxation.”). This Court should reject URM’s invitation to broadly construe the direct seller’s

³ RCW 82.04.423(2).

⁴ RCW 82.04.423(1)(d) and (2) (emphasis added).

⁵ RCW 82.04.423(2)(b).

exemption in favor of Dot Foods (and URM). Instead, the Court should read RCW 82.04.423 as a whole and give meaning and effect to all of the words used in the statute; if it does, the Court should affirm the trial court's summary judgment order.

II. ARGUMENT

A. The Benefit Of The Direct Seller's Exemption Is Not Limited To The Door-To-Door Sales Industry.

URM begins its argument on a false premise, that the Department's position is that "the Legislature intended RCW 82.04.423 to benefit only the door-to-door sales industry." Mem. of Amicus Curiae at 3. The Department's position is not so limited. The direct seller's exemption is available to out-of-state sellers selling consumer products in Washington that ultimately are sold "in the home or otherwise than in a permanent retail establishment." This would include ultimate sales occurring in vendor booths at fairs, other temporary retailing booths, or anywhere else other than in a permanent retail establishment.⁶

B. The Use Of Specific Language From Federal Legislation Applying To Direct Selling Activities Supports The Conclusion That The Legislature Intended The Direct Seller's Exemption To Apply To Comparable Selling Activities.

⁶ See also Br. of Resp't at 1 ("The exemption is for certain out-of-state sellers using direct sales activities such as in-home parties or door-to door solicitations. It is modeled on federal legislation that applies to representatives of sellers [that] market consumer products in the home or at other non-permanent retail locations such as booths at fairs and exhibitions," (Emphasis added)).

URM also mischaracterizes the Department's position with respect to 26 U.S.C. § 3508. URM asserts that the Department "argues to this Court that the Legislature's use of the language from a prior federal statute . . . raises a presumption that the federal law's scope is the same as RCW 82.04.423," Mem. of Amicus Curiae at 3, and that "RCW 82.04.423 [is] a mere mimic of the federal legislation." *Id.* at 6. URM then discusses the two statutes to show that their purposes are different. See *id.* at 3-4.⁷

URM's argument misses the mark. The Department did not discuss 26 U.S.C. § 3508 to show that its purpose and the purpose of RCW 82.04.423 are identical. The purposes of 26 U.S.C. § 3508 and RCW 82.04.423 obviously are quite different. The important point is this: the Legislature enacted RCW 82.04.423 to provide B&O tax relief to certain out-of-state businesses. In doing so, the Legislature used language from 26 U.S.C. § 3508 to describe which out-of-state businesses would receive the benefit of the B&O tax exemption (or, as URM states, "nexus relief."). The language that it used refers to a specific type of selling activity – direct selling.⁸ Indeed, RCW 82.04.423 expressly uses the term

⁷ URM states that Congress enacted 26 U.S.C. § 3508 to establish "two types of "statutory nonemployees" – real estate agents and direct sellers – in order to . . . more clearly allocate payroll liability between the service provider and his or her client" whereas RCW 82.04.423, "by contrast, was enacted to provide a break from business and occupation ("B&O") tax to out-of-state sellers – a tax preference that might be termed 'nexus relief.'" Mem. of Amicus Curiae at 3-4.

⁸ As explained in the Brief of Respondent, "[d]irect selling companies market their products through person to person contact away from a fixed retail location through

“direct seller’s representative.” The title of RCW 82.04.423 is “Exemptions – Sales by certain out-of-state persons to or through direct seller’s representatives.” Given the Legislature’s use of federal language that applies to a specific type of selling activity, direct selling, and the Legislature’s direct use of the term “direct seller’s representative” in RCW 82.04.423, a reasonable assumption is that the Legislature intended to exempt from B&O tax out-of-state businesses engaging in comparable selling activities.

What seems unreasonable is to argue, as does URM, that the Legislature used specific language directed at a specific type of selling activity, direct selling, to express its intent to exempt from B&O tax out-of-state sellers, like URM and Dot Foods, that sell their products using traditional selling activities that in no manner remotely resemble direct selling. As Judge Hicks correctly concluded: “this little exemption . . . wasn’t intended to exempt manufacturers like Stroh’s or even redistributors like Dot Foods whose products end up down the line in permanent retail establishments.” RP at 11.⁹ Instead, by including language such as “in the home or otherwise than in a permanent retail

a network of independent sellers. . . . [D]irect selling provides a channel of distribution for companies with innovative or distinctive products not readily available in traditional retail stores, or who cannot afford to compete with the enormous advertising and promotion costs associated with gaining space on retail shelves.” Br. of Respondent at 15 (citing CP at 198-99).

⁹ A copy of the trial court’s ruling is appended to the Brief of Respondent.

establishment,” the Legislature expressed an intent to benefit only those out-of-state seller using selling methods that result in their products being sold in places other than permanent retail establishments.

In sum, contrary to URM’s argument, that the Legislature used the federal direct seller language for a different purpose than did Congress does not undermine the conclusion that the Legislature intended to exempt from the B&O tax only gross income from direct selling or comparable activities.

C. The Legislative History Does Not Support URM’s Argument That The Legislature Intended The Direct Seller’s Exemption To Apply To Out-Of-State Sellers, Like URM And Dot Foods, That Use Traditional Selling Methods To Sell Their Consumer Products In Permanent Retail Establishments.

URM’s reliance on selective parts of the legislative history likewise is not compelling. First, as URM concedes, Senator Moore’s statement is not necessarily indicative of legislative intent. Mem. of Amicus Curiae at 6 (citing Wash. State Legislature v. Lowry, 131 Wn.2d 309, 326, 931 P.2d 885 (1997)). In the case URM cites, the Supreme Court states:

The intent of legislature sponsors of a measure is noteworthy, but not conclusive as to our interpretation of the plain language of a measure. Chrysler Corp. v. Brown, 441 U.S. 281, 311, 99 S. Ct. 1705, 60 L. Ed. 2d 208 (1979) (“The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history.”); Spokane County Health Dist. v. Brockett, 120 Wn.2d 140 154-55,

839 P.2d 324 (1992) (“a legislator’s comments from the floor are not necessarily indicative of legislative intent.”); North Coast Air Servs., Ltd. v. Grumman Corp., 111 Wn.2d 315, 325-26, 759 P.2d 405 (1988) (legislative colloquy not conclusive as to legislative intent).

Lowry, 131 Wn.2d at 326.

Second, several factors should lead one to give little, if any, weight to Senator Moore’s statement. He did not sponsor the amendment that the Legislature enacted into law. Moreover, nothing in his statement indicates that he even talked to the amendment’s sponsor. Furthermore, Senator Moore’s statement – “Well, to the best of my knowledge, it does and additionally I can say, it better”¹⁰ – is far from definitive. In fact, based on his words, it appears Senator Moore probably was concerned that the amended language might not cover the occupants of the Seattle Trade Center.

Third, URM’s use of the legislative history brings to mind the quote from Supreme Court Justice Antonin Scalia describing the “use of legislative history as the equivalent of entering a crowded cocktail party

¹⁰ The Paul Gronnert memorandum to Senator Lee cited by URM likewise is less than firm. His memorandum reviewing SSB 3244 states: “the Trade Center is not a retail establishment and so it would appear that the method of solicitation would be included within the purview of the amendment.” Mem. of Amicus Curiae, App. E. In its brief, URM incorrectly states that the Gronnert memorandum was formerly available on the Department’s website but no longer is. See Mem. of Amicus Curiae at 6 n.1. The subject memorandum is available at [http://dor.wa.gov/rulesfiles/Rule246/246\(1984\)/Page39.htm](http://dor.wa.gov/rulesfiles/Rule246/246(1984)/Page39.htm) (last visited August 29, 2007). The likely reason URM failed to locate the document is that the address stated in footnote 1 of its brief includes a space between “246” and “(1984)” which is not in the correct address.

and looking over the heads of the guests for one's friends." Conroy v. Aniskoff, 507 U.S. 511, 519, 113 S. Ct. 1562, 123 L. Ed. 2d 229 (1993) (Scalia, J., concurring). In its brief, URM selectively points out a friend or two (and not very close ones), while conveniently ignoring other legislative history that is contrary to its expansive reading of the direct seller's exemption provided by RCW 82.04.423.

The initial legislation addressing the Seattle Trade Center issue (HB 566 and SB 3482)¹¹ was drafted to "impose the wholesaling and retailing B&O taxes only upon persons who either own or lease real property within Washington or who regularly maintain a stock of tangible personal property in Washington for sale in the regular course of business." App. A at 7.¹² The fiscal note for these companion bills estimated a revenue loss of \$34,000,000 during the 1983-85 biennium. App. A at 6.

Neither HB 566 nor SB 3482 passed the Legislature. In their place, the language that is now codified as the direct seller's exemption in RCW 82.04.423 was added to SSB 3244 by Representative Marlin

¹¹ SB 3482 is the bill that Senator Moore sponsored. Senate Journal, 47th Legis., 1st Ex. Sess. 158 (1983).

¹² A copy of the bill file for HB 566 maintained by State Archives is appended at A-1 through A-9. State Archives does not have a bill file for SB 3482. See also App. A-8 through App. A-9 (draft of HB 566).

Applewick. App. B at 1.¹³ Reading OFM's Enrolled Bill Analysis, a reasonable inference is that one purpose of the substitute language was to significantly reduce its fiscal impact by limiting the B&O tax exemption to companies like Avon and Amway:

Section 5 is a modified version of a bill section originally contained in HB 566. The apparent intent of this section is to exempt from B&O taxes the monies earned by firms such as Avon, Amway, etc. The section was added as a House floor amendment and was later concurred in by the Senate. Initial review of the provisions of this section by the Department of Revenue indicates that implementation may result in a \$1.2 million loss to state revenue from B&O tax. This provision would not exempt the individual sales person ("direct sellers' [sic] representative") selling products from firms such as Avon, etc.

App. B. at 6 (emphasis added).

Consequently, contrary to the impression URM seeks to create, there is legislative history supporting the Department's position that the Legislature through SSB 3244 intended to provide a B&O tax exemption with a limited fiscal impact to a discrete group of out-of-state sellers, rather than broadly exempting out-of-state sellers, like URM and Dot Foods, that use traditional selling methods to sell consumer products in permanent retail establishments.

Finally, URM's legislative history argument relies on a fact that is not supported by the record, namely that the garments sold by Seattle

¹³ A copy of the bill file for SSB 3244 maintained by State Archives is appended at B-1 through B-27.

Trade Center representatives, “when sold at retail, were not sold solely in the home.” Mem. of Amicus Curiae at 6 (without citation to the record). Nothing in the record, or the legislative history, establishes where the garments were sold. It is entirely possible, therefore, that none of the garments ultimately were sold at retail in permanent retail establishments. Indeed, as noted in the Gronnert memorandum, the “Trade Center is not a permanent retail establishment.” Mem. of Amicus Curiae, App. E. Therefore, Senator Moore’s belief (or wishful hope) that RCW 82.04.423 would apply to the occupants at the Seattle Trade Center does not undermine the Department’s argument that the Legislature did not intend the direct seller’s exemption to apply to out-of state sellers if their consumer products ultimately are sold at retail in permanent retail establishments.

D. The Wording Differences Between RCW 82.04.423(2) and 26 U.S.C. § 3508 Do Not Support URM’s Conclusion That The Legislature Did Not Intend To Distinguish Between Wholesaling Direct Sellers And Retailing Direct Sellers.

URM argues that certain changes in the wording describing a “direct seller’s representative” in RCW 82.04.423(2) from the wording describing a direct seller in 26 U.S.C. § 3508 “implies that the Legislature did not intend to adopt the wholesale/retail dichotomy in the federal statute.” Mem. of Amicus Curiae at 9. URM’s argument has no merit.

URM concedes that the two comparable parts in the federal statute distinguish between wholesaling direct sellers and retailing direct sellers. Mem. of Amicus Curiae at 8 (“Because the first clause requires the ‘direct seller’ to sell to a ‘buyer’ ‘for resale,’ it is clear that the first clause applies only to wholesale transactions and the second clause cannot apply to wholesale transactions.”). But it is equally clear that only a wholesaling direct seller may qualify for the direct seller’s exemption under the first part of RCW 82.04.423(2) because it requires a representative “who buys consumer products . . . for resale, . . .” Since that is the case, using URM’s logic, as the first part of RCW 82.04.423(2) applies only to wholesaling direct sellers, it should be clear that the second part does not apply to wholesaling direct sellers, but only to retailing direct sellers. This conclusion is bolstered by the fact that the Legislature did not include “sells for resale” as part of “sells, or solicits the sale of, consumer products” in subsection (2) of the statute, thus indicating it did not intend that part to apply to wholesaling direct sellers.

Finally, URM argues that the Legislature’s failure to include the word “retail” in the “who sells, or solicits the sale of, consumer products” part of RCW 82.04.423(2) indicates that it did not intend to limit that part to retailing direct sellers. See Mem. of Amicus Curiae at 9. URM’s argument proves nothing. This Court is considering the statute that the

Legislature actually enacted, and the structure and words of that statute make it clear it did not intend the direct seller's exemption to apply to out-of-state sellers if their consumer products ultimately are sold at retail in permanent retail establishments.

E. Accepting URM's Argument Would Render Meaningless The Word "Exclusive" In RCW 82.04.423(1)(d).

URM argues that out-of-state sellers should be able to take the direct seller's exemption even if they sell non-consumer products to or through their representatives. See Mem. of Amicus Curiae at 10-11. Conspicuously missing from URM's argument is any attempt to explain what the Legislature intended by requiring that the direct seller "make[] sales in this state exclusively to or through a direct seller's representative." RCW 82.04.423(1)(d). Apparently, according to URM's argument, nothing.

URM posits the Department's argument leads to the conclusion that a direct seller would lose its exemption if its representative also sells non-consumer products for another client or sells business services rather than products. The Department disagrees. The statute's language focuses on the relationship between the direct seller and its representative and the activities the representative performs for the direct seller. Subsection (2)(b), for example, requires that the representative's services be

performed “pursuant to a written contract between [the direct seller’s representative] and the [direct seller] for whom the services are performed” As such, a reasonable construction of the statute, and one favoring the direct seller, is that the statute does not concern itself with sales activities a representative may perform for another entity. What is relevant is the type of products (non-consumer products) the out-of-state seller sells to or through its representatives and how and where those products are sold.

URM also points out that the “IRS view is that exclusivity is not required” Mem. of Amicus Curiae at 10-11. But that is hardly surprising. The word “exclusively” is not contained in the federal legislation. It is, however, contained in the direct seller’s exemption. Thus, like Dot Foods, URM is asking this Court to give no effect to the exclusivity requirement in RCW 82.04.423(1)(d).

F. Accepting URM’s Argument Would Render Meaningless The Requirements In RCW 82.04.423(2)(a) and (2)(b).

URM argues that the federal statute’s use of the word “individual” rather than “person” undermines the Department’s argument that a direct seller’s representative must be a natural person. Mem. of Amicus Curiae at 11-12. Regardless, RCW 82.04.423(2)(a) and (b) contain requirements that only make sense when applied to natural persons. See Br. of Resp’t at

28-30. Thus, once again, URM would have this Court construe a requirement imposed by RCW 82.04.423 in a way that renders it meaningless.¹⁴

Furthermore, while the Legislature did not use the word “individual” in RCW 82.04.423(2)(a) or (2)(b), it twice added the word “who” directly after “person” in the definition of a direct seller’s representative in section (2). Properly used, “who” refers to people (natural persons) and not artificial persons or things such as corporations. See, e.g., *The Blue Book of Grammar and Punctuation* at 1 (located at <http://www.grammarbook.com/grammar/whoVwhVt.asp>) (last visited August 30, 2007).¹⁵ The Legislature’s addition of the word “who,” therefore, suggests that only a natural person may qualify as a direct seller’s representative.

III. CONCLUSION

In sum, like Dot Foods, URM essentially asks this Court to construe the words “who sells, or solicits the sale of, consumer products in the home or otherwise in a permanent establishment” to allow out-of-state sellers to take the direct seller’s exemption even if: (a) their products are sold in permanent retail establishments; and (b) they sell non-consumer

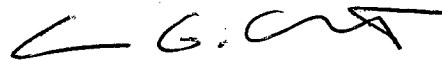
¹⁴ Unlike litigants, however, courts are not permitted to simply avoid or ignore words in a statute. *In re Parentage of J.M.K.*, 155 Wn.3d 374, 393, 199 P.3d 840 (2005).

¹⁵ A copy of the cited webpage is appended at C-1 to C-2.

products through their representative. Also, like Dot Foods, URM asks this Court to render meaningless RCW 82.04.423(2)(a) and (2)(b), including the requirement of a written contract providing that the representative will not be treated as an employee for federal tax purposes. This Court should reject URM's flawed approach to statutory construction, narrowly construe the direct seller's exemption while giving effect to all of its words, and affirm the trial court's order granting summary judgment to the Department.

RESPECTFULLY SUBMITTED this 31st day of August, 2007.

ROBERT M. MCKENNA
Attorney General

A handwritten signature in black ink, appearing to read "C. G. Comfort", written over the printed name.

CAMERON G. COMFORT
Sr. Assistant Attorney General
WSBA #15188
Attorneys for Respondent

APPENDIX

A-1 through A-9

HB 566 Bill File

B-1 through B-27

SSB 3244 Bill File

C-1 to C-2

The Blue Book of Grammar and
Punctuation webpages

HOUSE BILL NO. 566

By: Prince, Walk, Sanders, Todd,
Miller

BRIEF TITLE:

Defining engaging in business "within
this state" for certain B&O tax
purposes.

2-14-83 Filed w/Chief Clerk for introduction
2-15-83 Read first/Referred to Committee on:
WAYS & MEANS

Reported w/recommendation:

MAJORITY: { Do Pass _____
Do pass w/amendment _____
Substitute House Bill be substituted
therefor & substitute do pass _____

MINORITY: { Do Not Pass _____
Without recommendation _____

Referred to Committee on:

Reported w/recommendation:

☐ Rules 2
☐ Rules suspended/Advanced to 2nd Rdg.
Read 2nd time. ☐ HELD
☐ Amended ☐ Ordered Engrossed ☐ Substituted

☐ Rules 3
☐ Rules Suspended/Advanced to 3rd Rdg.
Read 3rd time. ☐ HELD

☐ PASSED _____ YEAS _____ NAYS
☐ NOTICE OF RECONSIDERATION

Title agreed to/sent to SENATE

Chief Clerk

SENATE RECORD: Floor # _____

Received from House
Read first/Referred to Committee on:
Reported w/recommendation:

Do Pass _____
Do pass w/amendment _____
Substitute House Bill be substituted
therefor & substitute do pass _____

☐ Rules Suspended/Advanced to 2nd Rdg.
Read 2nd time. ☐ Held ☐ Amended

☐ Rules Suspended/Advanced to 3rd Rdg.
Read 3rd time. ☐ HELD

☐ PASSED AS AMENDED
☐ PASSED _____ YEAS _____ NAYS
☐ NOTICE OF RECONSIDERATION

Title agreed to/returned to HOUSE.

Secretary of Senate

HOUSE RECORD:
☐ Do Not Concur
☐ Do Concur _____ w/Exception

☐ PASSED AS SENATE AMENDED
_____ YEAS _____ NAYS

Chief Clerk

☐ ENROLLED
Speaker of House signs
President of Senate signs
Delivered to Governor
Governor signs
☐ VETO ☐ PARTIAL VETO

Filed w/Secretary of State

HOUSE RECORD:

☐ Rules 3
☐ Received from Senat
☐ Referred to Committee or
Reported w/recommendation

☐ Rules suspended/Placed on 2nd Rdg.
Read 2nd time. ☐ HELD
☐ Amended ☐ Ordered Engrossed ☐ Substitute

☐ Rules Suspended/Advanced to 3rd Rdg.
Read 3rd time. ☐ HELD

☐ PASSED _____ YEAS _____ NAYS
☐ NOTICE OF RECONSIDERATION

Title agreed to/sent to SENATE

Chief Clerk

See back of cover.

A-1

1 AN ACT Relating to business and occupation taxation of out-of- CR83B
2 state businesses; amending section 82.04.270, chapter 15, Laws of F
3 1961 as last amended by section 4, chapter 172, Laws of 1981 and RCW H
4 82.04.270; amending section 82.04.250, chapter 15, Laws of 1961 as -486;
5 last amended by section 2, chapter 172, Laws of 1981 and RCW 1
6 82.04.250; and creating a new section. PARTA

7 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON: ;2

8 Sec. 1. Section 82.04.270, chapter 15, Laws of 1961 as last 10
9 amended by section 4, chapter 172, Laws of 1981 and RCW 82.04.270 are 12
10 each amended to read as follows: 12

11 (1) Upon every person except persons taxable under subsections 14
12 (1) or (8) of RCW 82.04.260 engaging within this state in the 14
13 business of making sales at wholesale; as to such persons the amount 15
14 of tax with respect to such business shall be equal to the gross 16
15 proceeds of sales of such business multiplied by the rate of forty- 17
16 four one-hundredths of one percent. 18

17 (2) For the purposes of this section: 19

18 (a) A person is engaged in wholesale business activities "within 20
19 this state" only if that person: 20

20 (i) Owns or leases real property within this state; or 21

21 (ii) Regularly maintains a stock of tangible personal property in 22
22 this state for sale in the ordinary course of business. 23

23 (b) A person shall not be considered to be engaged in business 24
24 "within this state" merely by reason of the solicitation in this 25
25 state by such person, or by an independent contractor, agent, or 26
26 representative of such person, of orders for sales to or on behalf of 27
27 a customer of such person, if the orders are sent outside this state 28
28 for approval or rejection and, if approved, are filled by shipment or 29
29 delivery from a point outside this state. 29

1 (3) The tax imposed by this section is levied and shall be 30
2 collected from every person engaged in the business of distributing 31
3 in this state articles of tangible personal property, owned by them 33
4 from their own warehouse or other central location in this state to 34
5 two or more of their own retail stores or outlets, where no change of 35
6 title or ownership occurs, the intent hereof being to impose a tax 36
7 equal to the wholesaler's tax upon persons performing functions 37
8 essentially comparable to those of a wholesaler, but not actually 38
9 making sales: PROVIDED, That the tax designated in this section may 39
10 not be assessed twice to the same person for the same article. The 40
11 amount of the tax as to such persons shall be computed by multiplying 41
12 forty-four one-hundredths of one percent of the value of the article 42
13 so distributed as of the time of such distribution: PROVIDED, That 43
14 persons engaged in the activities described in this subsection shall 44
15 not be liable for the tax imposed if by proper invoice it can be 45
16 shown that they have purchased such property from a wholesaler who 46
17 has paid a business and occupation tax to the state upon the same 47
18 articles. This proviso shall not apply to purchases from 47
19 manufacturers as defined in RCW 82.04.110. The department of revenue 49
20 shall prescribe uniform and equitable rules for the purpose of 50
21 ascertaining such value, which value shall correspond as nearly as 51
22 possible to the gross proceeds from sales at wholesale in this state 52
23 of similar articles of like quality and character, and in similar 53
24 quantities by other taxpayers: PROVIDED FURTHER, That delivery 53
25 trucks or vans will not under the purposes of this section be 54
26 considered to be retail stores or outlets. 55

27 Sec. 2. Section 82.04.250, chapter 15, Laws of 1961 as last 57
28 amended by section 2, chapter 172, Laws of 1981 and RCW 82.04.250 are 59
29 each amended to read as follows: 59

30 (1) Upon every person except persons taxable under RCW 61
31 82.04.260(8) engaging within this state in the business of making 62
32 sales at retail, as to such persons, the amount of tax with respect 63
33 to such business shall be equal to the gross proceeds of sales of the 64
34 business, multiplied by the rate of forty-four one-hundredths of one 65
35 percent. 65

36 (2) For the purposes of this section: 66

1 (a) A person is engaged in retail business activities "within 67
2 this state" only if that person: 67
3 (i) Owns or leases real property within this state; or 68
4 (ii) Regularly maintains a stock of tangible personal property in 69
5 this state for sale in the ordinary course of business. 70
6 (b) A person shall not be considered to be engaged in business 71
7 "within this state" merely by reason of the solicitation in this 72
8 state by such person, or by an independent contractor, agent, or 73
9 representative of such person, of orders for sales to or on behalf of 74
10 a customer of such person, if the orders are sent outside this state 75
11 for approval or rejection and, if approved, are filled by shipment or 76
12 delivery from a point outside this state. 76

13 NEW SECTION. Sec. 3. Nothing in this act shall be construed as 78
14 implying that the mere solicitation of orders by independent 79
15 contractors already constitutes engaging in business within the 79
16 state, nor that it was the intent of the legislature that activities 80
17 of distinct economic entities, such as retailers, wholesalers, and 81
18 independent contractors, be imputed to an out-of-state business for 82
19 the purpose of determining whether it was engaged in business within 83
20 the state. 83

H. B. 566 by Representatives Prince,
Walk, Sanders, Todd, Miller

Defining engaging in business "within
this state" for certain B & O tax
purposes.

Limits the definition of retailers
and wholesalers doing business "within
this state" to retailers and wholesal-
ers who own or lease real property in
the state or who regularly maintain a
stock of tangible personal property in
the state.

--1983 REGULAR SESSION--

Feb 15 First reading, referred to Ways
& Means.

FISCAL NOTE

REQUEST NO. 46

BILL NO. SB 3482/ HB 566	RESPONDING AGENCY Department of Revenue	
TITLE B&O Tax Exemption, Certain Out-of-State Firms, Sales Through Agents and Independent Contractors	PREPARED BY Gordon Wiggerhaus	DATE 2-16-83
	TITLE Economic Analyst	SCAN 3-2122
	REVIEWED BY OFM <i>Paul Way</i>	DATE

Fiscal impact of the above legislation on Washington State government is estimated to be:

☐ NONE☒ AS SHOWN BELOW

Figures in parentheses represent reductions.
Detail supporting these estimates is
contained in Form FN-2.

REVENUE TO:

First Biennium 19 83 — 19 85

FUND	CODE	SOURCE TITLE	CODE	1ST YEAR	2ND YEAR	TOTAL	FIRST SIX YEARS
GENERAL FUND — STATE	001	B&O	105	(\$15,000,000)	(\$19,000,000)	(\$34,000,000)	(\$170,000,000)
GENERAL FUND — FEDERAL	001						
OTHER *							
TOTALS				(\$15,000,000)	(\$19,000,000)	(\$34,000,000)	(\$170,000,000)

EXPENDITURES FROM:

FUND	CODE				
GENERAL FUND — STATE	001				
GENERAL FUND — FEDERAL	001				
OTHER *					
TOTALS					

* Itemize all other, including non-appropriated funds
and/or accounts within the General Fund.

EXPENDITURES BY OBJECT OR PURPOSE:

FTE STAFF YEARS				
SALARIES AND WAGES				
PERSONAL SERVICE CONTRACTS				
GOODS AND SERVICES				
TRAVEL				
EQUIPMENT				
EMPLOYEE BENEFITS				
GRANTS AND SUBSIDIES				
INTERAGENCY REIMBURSEMENT				
DEBT SERVICE				
CAPITAL OUTLAYS				
TOTALS				

Check this box if the above legislation has
cash flow impact per instructions: ☐
Show cash flow impact on FN-2.

Check this box if the above legislation has fiscal
impact on local governments: ☐
Do not include local government impact on FN-1.

A-6

FISCAL NOTE

Department of Revenue
Responding Agency

140
Code No.

REQUEST NUMBER 46

Bill No. SB 3482/ HB 566

February 16, 1983

Date Submitted

Description:

Presently sales to persons in Washington are subject to retail and wholesale business and occupation taxation when the property is shipped from points outside Washington and the seller carries on activity in Washington which is significantly associated with the seller's ability to establish and maintain a market in Washington. Such sales are exempt from B&O taxation only if there is no participation whatsoever by the seller's branch office, local outlet, or by an agent or other representative of the seller. Specifically, orders solicited through independent manufacturer's representatives and salesmen who are employees of the seller are taxable even if the seller carries on no other activity in Washington. The existence of factories, stores, warehouses and stocks of goods in Washington is not necessary for such sales to be subject to taxation.

This bill would impose the wholesaling and retailing B&O taxes only upon persons who either own or lease real property within Washington or who regularly maintain a stock of tangible personal property in Washington for sale in the regular course of business. In addition, the bill would specifically exempt from wholesaling and retailing B&O taxation persons who only solicit sales in Washington through agents, salesmen or independent contractors, if the orders are sent outside Washington and filled by shipment from a point outside the state. The bill would reverse a 1974 revision of WAC 458-20-193B, Sales of Goods Originating in Other States to Persons in Washington, which resulted from a U. S. Supreme Court decision.

Revenue Impact:

The revenue estimate assumes that 20 percent of the out-of-state businesses reporting wholesaling income in Washington and 10 percent of the out-of-state businesses reporting retailing income either do not own or lease real property in Washington or do not maintain a stock of tangible personal property in Washington for sale. This assumption is based on out-of-state audit experience for these types of sales. These businesses would no longer pay wholesaling and retailing B&O tax.

A significant amount of the revenue loss is due to reduced out-of-state audit assessments resulting from the elimination of taxation for the above firms. It should also be noted that the bill gives out-of-state businesses an incentive to alter their marketing structure in order to escape taxation. Any revenue loss resulting from this restructuring is not included in the revenue loss estimate, but could be substantial.

Expenditure Impact:

No impact on state expenditures.

A-7

Read first time February 15, 1983 and referred to Committee on Ways & Means.

1 AN ACT Relating to business and occupation taxation of out-of-
2 state businesses; amending section 82.04.270, chapter 15, Laws of
3 1961 as last amended by section 4, chapter 172, Laws of 1981 and RCW
4 82.04.270; amending section 82.04.250, chapter 15, Laws of 1961 as
5 last amended by section 2, chapter 172, Laws of 1981 and RCW
6 82.04.250; and creating a new section.

7 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

8 Sec. 1. Section 82.04.270, chapter 15, Laws of 1961 as last
9 amended by section 4, chapter 172, Laws of 1981 and RCW 82.04.270 are
10 each amended to read as follows:

11 (1) Upon every person except persons taxable under subsections
12 (1) or (8) of RCW 82.04.260 engaging within this state in the
13 business of making sales at wholesale; as to such persons the amount
14 of tax with respect to such business shall be equal to the gross
15 proceeds of sales of such business multiplied by the rate of forty-
16 four one-hundredths of one percent.

17 (2) For the purposes of this section:

18 (a) A person is engaged in wholesale business activities "within
19 this state" only if that person:

20 (i) Owns or leases real property within this state; or

21 (ii) Regularly maintains a stock of tangible personal property in
22 this state for sale in the ordinary course of business.

23 (b) A person shall not be considered to be engaged in business
24 "within this state" merely by reason of the solicitation in this
25 state by such person, or by an independent contractor, agent, or
26 representative of such person, of orders for sales to or on behalf of
27 a customer of such person, if the orders are sent outside this state
28 for approval or rejection and, if approved, are filled by shipment or
29 delivery from a point outside this state.

A-8

(3) The tax imposed by this section is levied and shall be collected from every person engaged in the business of distributing in this state articles of tangible personal property, owned by them from their own warehouse or other central location in this state to two or more of their own retail stores or outlets, where no change of title or ownership occurs, the intent hereof being to impose a tax equal to the wholesaler's tax upon persons performing functions essentially comparable to those of a wholesaler, but not actually making sales: PROVIDED, That the tax designated in this section may not be assessed twice to the same person for the same article. The amount of the tax as to such persons shall be computed by multiplying forty-four one-hundredths of one percent of the value of the article so distributed as of the time of such distribution: PROVIDED, That persons engaged in the activities described in this subsection shall not be liable for the tax imposed if by proper invoice it can be shown that they have purchased such property from a wholesaler who has paid a business and occupation tax to the state upon the same articles. This proviso shall not apply to purchases from manufacturers as defined in RCW 82.04.110. The department of revenue shall prescribe uniform and equitable rules for the purpose of ascertaining such value, which value shall correspond as nearly as possible to the gross proceeds from sales at wholesale in this state of similar articles of like quality and character, and in similar quantities by other taxpayers: PROVIDED FURTHER, That delivery trucks or vans will not under the purposes of this section be considered to be retail stores or outlets.

Sec. 2. Section 82.04.250, chapter 15, Laws of 1961 as last amended by section 2, chapter 172, Laws of 1981 and RCW 82.04.250 are each amended to read as follows:

(1) Upon every person except persons taxable under RCW 82.04.260(8) engaging within this state in the business of making sales at retail, as to such persons, the amount of tax with respect to such business shall be equal to the gross proceeds of sales of the business, multiplied by the rate of forty-four one-hundredths of one percent.

(2) For the purposes of this section:

(a) A person is engaged in retail business activities "within this state" only if that person:

(i) Owns or leases real property within this state; or
(ii) Regularly maintains a stock of tangible personal property in this state for sale in the ordinary course of business.

(b) A person shall not be considered to be engaged in business "within this state" merely by reason of the solicitation in this state by such person, or by an independent contractor, agent, or representative of such person, of orders for sales to or on behalf of a customer of such person, if the orders are sent outside this state for approval or rejection and, if approved, are filled by shipment or delivery from a point outside this state.

NEW SECTION. Sec. 3. Nothing in this act shall be construed as implying that the mere solicitation of orders by independent contractors already constitutes engaging in business within the state, nor that it was the intent of the legislature that activities of distinct economic entities, such as retailers, wholesalers, and independent contractors, be imputed to an out-of-state business for the purpose of determining whether it was engaged in business within the state.

On page 3, after line 14, insert the following new section:

"NEW SECTION. Sec. 4. There is added to chapter 82.04 RCW a new section as follows:

(1) This chapter shall not apply to any person in respect to gross income derived from the business of making sales at wholesale or retail if such person:

- (a) Does not own or lease real property within this state; and
- (b) Does not regularly maintain a stock of tangible personal property in this state for sale in the ordinary course of business; and
- (c) Is not a corporation incorporated under the laws of this state; and
- (d) Makes sales in this state exclusively to or through a direct seller's representative.

(2) For purposes of this section, the term "direct seller's representative" means a person who buys consumer products on a buy-sell basis or a deposit-commission basis for resale, by the buyer or any other person, in the home or otherwise than in a permanent retail establishment, or who sells, or solicits the sale of, consumer products in the home or otherwise than in a permanent retail establishment; and

- (a) Substantially all of the remuneration paid to such person, whether or not paid in cash, for the performance of services described in this subsection is directly related to sales or other output, including the performance of services, rather than the number of hours worked; and
- (b) The services performed by the person are performed pursuant to a written contract between such person and the person for whom the services are performed and such contract provides that the person will not be treated as an employee with respect to such purposes for federal tax purposes.

(3) Nothing in this section shall be construed to imply that a person exempt from tax under this section was engaged in a business activity taxable under this chapter prior to the enactment of this section."

01285

ADOPTED
5-17-83
He

1 establishment; and

2 (a) Substantially all of the remuneration paid to such person,
3 whether or not paid in cash, for the performance of services
4 described in this subsection is directly related to sales or other
5 output, including the performance of services, rather than the number
6 of hours worked; and

7 (b) The services performed by the person are performed pursuant
8 to a written contract between such person and the person for whom the
9 services are performed and such contract provides that the person
10 will not be treated as an employee with respect to such purposes for
11 federal tax purposes.

12 (3) Nothing in this section shall be construed to imply that a
13 person exempt from tax under this section was engaged in a business
14 activity taxable under this chapter prior to the enactment of this
15 section.

Passed the Senate May 22, 1983.

John A. Cherberg
President of the Senate.

Passed the House May 17, 1983.

Wayne Ellman
Speaker of the House.

Approved June 13, 1983

John Spellman
Governor of the State of Washington

FILED

JUN 13 1983

SECRETARY OF STATE
STATE OF WASHINGTON

4:00 pm

OFM - ENROLLED BILL ANALYSIS

DIRECTOR'S COMMENTS

Bill Number SSB 3244

Date 6/6/83

Comments

Recommended Action

Sign (X)

Do Not Sign - Let Pass ()

Veto Sections _____ ()

Veto ()

Joe Toller
(Signature)

9/82/005.2

BR

Shaklee

Shaklee Corporation

Shaklee Terraces 444 Market Street
San Francisco, CA 94111
Telephone 415/954-2688
TWX 910 372 6016

Claude M. Jarman

Vice President
Corporate Communications

OFFICE OF THE GOVERNOR
CORRESPONDENCE DISTRIBUTION

ORIGINAL: GOV
ACTION: BILL FILE ✓
XC'S: _____

June 21, 1983

DATE: 6-27-83

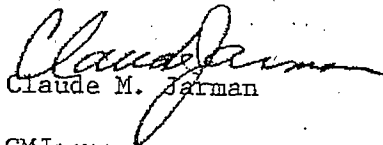
The Honorable John Spellman
Executive Department
Legislative Building
Olympia, WA 98504

Dear Governor Spellman:

I was pleased to learn that you recently signed into law Senate Bill No. 3244, which included a provision clarifying the application of the Business and Occupation Tax for out-of-state manufacturers.

As you know, this provision represents a workable compromise of a long standing legislative issue. I appreciate your recognition of its merit and your support of its enactment.

Sincerely,


Claude M. Jarman

CMJ:cvc

B-4

GOVERNOR'S STAFF - ENROLLED BILL ANALYSIS

Bill No. SSB 3244
 Title business and
occupation taxes

Rec'd 5-23-83
 Deadline 6-16 Thursday
 Ceremony _____
 To OFM 5-23-83
 From OFM 6-6-83

REVIEWED BY	RECOMMENDED ACTION
<u>X</u> Joe Teller	<u>X</u> Sign _____ Veto _____ PVS
_____ Marilyn Showalter	_____ Sign _____ Veto _____ PVS
<u>X</u> Steve Excell	<u>SE</u> Sign _____ Veto _____ PVS
_____ Naomi Sanchez	_____ Sign _____ Veto _____ PVS
_____ Brian McCauley	_____ Sign _____ Veto _____ PVS
_____ Phil Rockefeller	_____ Sign _____ Veto _____ PVS
_____ Dave Stevens	_____ Sign _____ Veto _____ PVS
<u>X</u> Rollie Schmitten	<u>OK</u> Sign _____ Veto _____ PVS
<u>X</u> Richard Allison	<u>A</u> Sign _____ Veto _____ PVS
<u>X</u> DOR	_____ Sign _____ Veto _____ PVS <u>\$5</u>
_____	_____ Sign _____ Veto _____ PVS
_____	_____ Sign _____ Veto _____ PVS

_____ The Governor ASB Sign _____ Veto _____ PVS

COMMENTS (PLEASE INITIAL) §§ 1 & 2 ARE THE GOVERNOR'S EXECUTIVE REQUEST BILL ON EXEMPTING
FEDERAL GRANTS TO LOCAL GOV'TS FROM THE B&O TAX. §§ 3-5 ARE OTHER TAX
EXEMPTIONS OF WHICH ONLY \$5 IS IN CONTROVERSY. §5 ATTEMPTS TO DEFINE
WHICH OUT-OF-STATE MANUFACTURERS ARE EXEMPT FROM STATE TAXATION. MUCH
CONTROVERSY HAS SURROUNDED^{ED} PYRAMIDAL SALES ORGANIZATIONS. IN-STATE SELLERS
(OF AMON, SHAKLEE, MARY KAY COSMETICS, ETC) ARE CLEARLY TAXABLE. NOT CLEAR
IS THE SITUATION INVOLVING OUT-OF-STATE FIRMS WHICH MERELY SHIP INTO
THE STATE THEIR PRODUCTS (W/ NO INVENTORY, PROPERTY OR EMPLOYEES IN
THE STATE). DOR HAS ATTEMPTED TO TAX THEM, SAYING THAT THE IN-STATE
SELLERS ARE THEIR AGENTS. BOTH THE IN-STATE SELLERS & THE MANU-
FACTURERS MAINTAIN THAT THESE IN-STATE SELLERS ARE "INDEPENDENT
CONTRACTORS." IRONICALLY, DOR (MAY COYLE) DRAFTED THE COMPROMISE
LANGUAGE IN THIS BILL. AFTER REVIEWING THE ISSUE, I FEEL THE LANGUAGE
IS ALMOST A RESTATEMENT OF EXISTING CASE LAW & A VETO ONLY
RAISES A TEMPEST IN A TEAPOT W/ THE DIRECT SELLERS.

RETURN TO MARILYN SHOWALTER AFTER EACH REVIEW.

B-5

OFM - ENROLLED BILL ANALYSIS

Bill Number SSB 3244 Short Title Excise Taxes
 Date Enrolled May 23, 1983 Analyst Claude Lakewold
 Date Due Governor May 26, 1983 Division Program Development

* * * * *

Bill Description

SB 3244 was originally introduced at the request of the Governor. This bill would have exempted community service agencies and local governments from paying B&O tax on federal grant funds.

The Substitute Senate Bill 3244 includes the Governor's requested B&O tax exemption clauses in Sections 1 and 2. The bill also includes three additional sections that pertain to other B&O tax modifications.

(continued)

Analysis (Issue background, analysis of program and fiscal impacts, pro and con arguments, principal proponents and opponents, other comments)

SSB 3244 modifies state law pertaining to the application of B&O tax for various activities.

The first two sections of SSB 3244 adopt the B&O tax exemptions requested by the Governor. The language in these two sections is identical to that originally recommended. (See attached PCAA report.)

Section 3 was added to provide specific exemption from B&O tax imposition to local municipal governments also engaged in similar activities as are exempted in Sections 1 and 2 and other service activities for which they charge a fee. Municipal owned and operated electrical utilities would not be included.

Section 4 of the bill was taken from a Department of Revenue request bill, HB 72. This section removes a "loop hole" in the application of the B&O tax to meat processors. The present law allows a lower B&O tax rate for processed meat sold at wholesale. Some meat processors are also involved in retail sales. Many of these persons pay only the lower wholesale B&O tax rate. The proposed amendment makes clear that the lower rate only applies to wholesale sales. Adoption of this amendment will allow the state to collect approximately \$500,000 more in taxes per year.

Section 5 is a modified version of a bill section originally contained in HB 566. The apparent intent of this section is to exempt from B&O taxes the monies earned by firms such as Avon, Amway, etc. The section was added as a House floor amendment and was later concurred in by the Senate. Initial review of the provisions of this section by the Department of Revenue indicates that implementation may result in a \$1.2 million loss to state revenue from B&O tax. This provision would not exempt the individual sales person ("direct sellers' representative") selling products from firms such as Avon, etc.

Sections 3, 4, and 5 are undergoing analysis by the Department of Revenue. They will provide a separate report. Their report will contain specific information regarding fiscal impacts.

* Sections 1, 2, 3, and 4 should be approved. No specific recommendation is made regarding Section 5; consideration of this section should be made pursuant to Department of Revenue's report.

(continued)

Recommended Action

Sign

(X) *

Do Not Sign - Let Pass

()

Veto Section(s)

NOTE: IF A BILL OR SECTION VETO IS RECOMMENDED, PLEASE COMPLETE OTHER SIDE.

Bill Description (continued)

Section 1 subsection (1) would add community action council to the definition of organizations eligible to be exempted from paying B&O tax. Section 1 subsection (2) would add to the list of activities which are exempted from B&O tax when performed by non-profit organizations engaged in the following:

- (a) weatherization assistance or minor home repair for low-income homeowners or renters;
- (b) assistance to low-income homeowners and renters to offset the rising cost of home heating energy; and,
- (c) community services to low-income individuals, families and groups, which are designed to reduce the causes of poverty in communities of the state.

Section 2 would exempt from the imposition of B&O tax grants received from the state or the United States by municipal corporations or political subdivisions.

Section 3 adds a new section that would exempt counties, cities, towns, school districts and fire districts from B&O tax payments regardless of how they are financed.

Section 4 makes clear that the reduced B&O tax rate paid by meat processors would only apply to wholesale sales and not to retail sales.

Section 5 adds a new section to the B&O tax law. This section would exempt from B&O tax gross income a person derived from wholesale or retail sales if such person: (1) does not own or lease real property within the state; (2) does not regularly maintain a stock of tangible personal property in the state for sale; (3) is not incorporated under the laws of the state; and (4) makes sales in this state exclusively to or through a direct seller's representative.

A "direct seller's representative" is defined as a person who buys consumer products on a "buy-sell" basis for resale in the home or other than a retail establishment. The remuneration a person may receive from such services must be directly related to sales rather than the number of hours worked. The sales services must be performed pursuant to a written contract and such contract would provide that the person will not be treated as an employee.

Analysis (continued)

The original Governor's request bill (SB 3244/HB 160) was supported by PCAA and several community action groups. Cities and counties support the inclusion of local government entities in Section 3. The Department of Revenue supports the amendment proposed in Section 4.

Attachment

B-7



STATE OF WASHINGTON

PLANNING & COMMUNITY AFFAIRS AGENCY

Ninth & Columbia Building, MS/GH51 • Olympia, Washington 98504 • (206) 753-2200

BACKGROUND of an act exempting defined recipients of state and federal grants from the Business and Occupation tax

The legislature in 1980 exempted certain non-profit health or social welfare organizations from paying B & O tax on a list of services. Grants for weatherization of low income homes, to assist in the payment of fuel costs, and the community services block grant which is designed to have an impact on poverty within communities of the state are not now exempted from B & O Tax. This bill would exempt those activities.

The proposed bill would also exempt from B & O tax grants received by municipal corporations or political subdivisions of the state.

The federal grants do not allow program funds to be used for any purpose except those permitted by the grant. Payment of taxes would fall under administration and could not be paid from program funds. The local share of administrative overhead is 5% for most of the grants (in one case there is no funding for administration) The 1% B & O tax would be due on the entire program but would have to be apid from the administrative funds. That means that 20% of the administrative allowance for these grants would have to be used to pay state taxes.

B-8

JOHN SPELLMAN
Governor



KAREN RAHM
Director

STATE OF WASHINGTON

PLANNING & COMMUNITY AFFAIRS AGENCY

Ninth & Columbia Building, MS/GH51 • Olympia, Washington 98504 • (206) 753-2200

SUMMARY of an act relating to Business and Occupation Taxes

This bill adds community action councils to the list of organizations not subject to the B & O tax. The bill also adds weatherization assistance or minor home repair for low-income households, assistance in the payment of energy costs to or on behalf of eligible households, and community services which have a measurable and potentially major impact on causes of poverty in the state's communities to the list of services which are not subject to the B & O tax when performed by a defined social or health service organization.

Additionally, B & O taxes would not be applied to federal or state grants received by municipal corporations or political subdivisions of the state.

B-9



STATE OF WASHINGTON

PLANNING & COMMUNITY AFFAIRS AGENCY

Ninth & Columbia Building, MS/GH51 • Olympia, Washington 98504 • (206) 753-2200

Section by Section Analysis
An Act relating to the Business and Occupation Tax

- Section 1. (1) Adds community action council to the definition of organizations eligible to be exempted from paying B & O tax under 82.04.4297.
- (2) Adds to the list of activities which are exempted from B & O tax when performed by organizations defined in subsection 1 of this Section:
- j) weatherization assistance or minor home repair for low-income homeowners or renters;
 - k) assistance to low-income homeowners and renters to offset the cost of home heating energy, through direct benefits to eligible households or to fuel vendors on behalf of eligible households; and,
 - l) community services to low-income individuals, families and groups, which are designed to have a measurable and potentially major impact on causes of poverty in communities of the state.
- New.
- Section 2. Exempts from the imposition of B & O tax grants received from the state or the United States by municipal corporations or political subdivisions.

OFM - ENROLLED BILL ANALYSIS

Number SSB 3244 Short Title Excise Taxes
 Date Enrolled 5/23 Analyst Dave Weig
 Date Due Governor 5/26 5 pm Division Forecasting
 Due to Fred 1 pm 5/26
 * * * * *

Bill Description

See description prepared by Program Development Division

Analysis (Issue background, analysis of program and fiscal impacts, pro and con arguments, principal proponents and opponents, other comments)

This bill combines portions of three bills into one (SB3244, HB72, HB566). The Department of Revenue is preparing an analysis and recommendation. No specific analysis or recommended action is proffered here since the basic issues concern tax administration and the Department of Revenue is preparing a response.

Recommended Action

Sign () Veto Bill ()
 Do-Not Sign - Let Pass () Veto Section(s) _____

NOTE: IF A BILL OR SECTION VETO IS RECOMMENDED, PLEASE COMPLETE OTHER SIDE.

B-11

**SUBSTITUTE
SENATE BILL NO. 3244**

BY

Committee on Ways and Means
(Originally sponsored by Senators
Thompson, Jones, Beyer, Bluechey,
Fuller, Granlund, Bender (by
Governor Spellman request))

Modifying provisions on excise taxes.

SENATE RECORD—

Filed by Committee and ordered printed
4-7-83
4-13-83 On motion Substi-
tuted for Original Bill, placed on calendar

4-13-83 Read second time and

Advanced to third reading
under suspension of rules.

B-12

4-13-83 Read third time and

Passed 46 Yea, 1 Nay
4-13-83 Title Agreed to
4-13-83 Sent to House

Secretary of the Senate.

HOUSE RECORD—

4-13-83 Received from Senate
Read first time and referred to Committee
on 5-5-83 Reported back by
Committee with the recommendation
MAJORITY do pass
MAJORITY do pass as amendeds. (21)
That Substitute Senate Bill
be substituted therefor and that Substitute
Bill Do Pass.
5-12-83 Passed to second reading.

5-12-83 Read second time and

Advanced to third reading

Advanced to third reading

Received from the i

Enrolled

Signed, President of the S

Signed, Speaker of the l

Signed by the Gov

SENATE RECORD—

APR 25 1983 Returned to S
and placed in Committee on Rule
third reading. Refer

Committee with the recommendation
MAJORITY do pass
MAJORITY do pass as amended
MINORITY do not pass
That Substitute Senate Bill
be substituted therefor and that Subs
Bill Do Pass
Passed to second reading

APR 26 1983 Read third time

APR 25 1983
43 Yea, Nays
Title Agre
Sent to 1

APR 25 1983

APR 25 1983

5-12-83 Read third time and

Passed 95 Amended

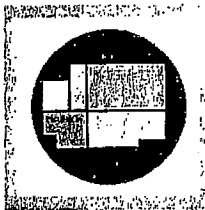
Year 95 Yea, 0
5-12-83 Title Agreed to
Returned to Senate

Chief Clerk.

MAY 22 1983

The Senate concurred in the House
Amendments and PASSED AS
AMENDED Yea 38 Nays 8

Secretary



Washington State Association of Counties

AREA CODE 206
TELEPHONE 491-7100

6730 MARTIN WAY N.E.
OLYMPIA, WASHINGTON 98506

May 27, 1983

The Honorable John Spellman
Governor of the State of Washington
Legislative Building
Olympia, Washington 98504

OFFICE OF THE GOVERNOR
CORRESPONDENCE DISTRIBUTION

ORIGINAL:
ACTION:
XCS:

MSS
GOV

DATE:

6-1-83

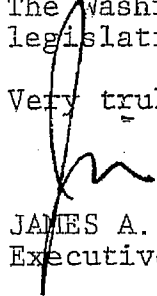
Dear Governor Spellman:

Substitute Senate Bill 3244 which revises the current applicability of the Business and Occupation tax to local governments is now before you awaiting your approval. The measure would exempt local governments from B & O taxation applied to grants received from the federal government.

As you are aware, many of these federal grants provide important funding sources to counties in carrying out human and social service programs. Taxing these grants diminishes the source of dollars important to meet desired program outcomes, and is counter-productive to their public purpose of federal aid.

The Washington State Association of Counties supported this legislation and requests your approval.

Very truly yours,


JAMES A. METCALF
Executive Director

JAM:smh

B-13

R. JACK STEPHENSON
BASIL L. BADLEY
MILTON C. SMITH
EDWARD L. MUELLER
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NICHOLAS P. SCARPELLI, JR.
JOHN M. MONAHAN
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Law Offices of
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A PROFESSIONAL SERVICES CORPORATION
17TH FLOOR, PARK PLACE BUILDING
SIXTH & UNIVERSITY
SEATTLE, WASHINGTON 98101
(206) 622-8020
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G. WILLIAM SHAW
A. RICHARD MALONEY

of counsel
ELVIN P. CARNEY
WILLIAM C. HALLIN

*and
6/1/83*

May 27, 1983

Governor John Spellman
Legislative Building
Olympia, Washington 98504

Re: SSB 3244 -- "Direct Seller Representatives"

Dear Governor Spellman:

This letter is to urge your support for the provisions of SSB 3244 which deal with the imposition of the B & O tax on certain out of state businesses. We represent the Direct Selling Association, a national trade association of companies which have over 60,000 direct seller representatives in Washington State.

The measure which is on your desk is the compromise result of a recommendation from the Joint Administrative Rules Review Committee, chaired by Senator Eleanor Lee. Prior to this legislative session, Senator Lee's committee held four lengthy hearings on attempts of the Department of Revenue to tax out of state businesses whose products are sold through the efforts of independent contractors and distributors, even though the out of state business has no real property, inventory, employees or representatives who are not independent contractors in this state. Washington statutes do not presently define what is meant to do business in this state. The result has been a policy of "taxation by ambush" and setting tax policy through the courts instead of the legislature.

Subsequent drafts of the original bill were developed to accommodate the Department of Revenue to reduce the fiscal note from \$30 million in the original bill (SB 3482) to approximately \$1.1 million in SB 3244. We believe the revenue impact has been consistently overstated, although it was not a significant issue in passage of SSB 3244, with

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Governor John Spellman
May 27, 1983
Page Two

respect to the amendment to SSB 3244 which passed the Senate 36 - 8 and the House 95 - 0.

SSB 3244 adds some equity and certainty to a very unfair and confusing area of the law by providing that the whole-sale B & O tax does not apply if a person does not own or lease realproperty or maintain inventory in Washington, and makes sales exclusively through a "direct sellers representative", which is narrowly defined and parallels federal law.

Steve Excell is intimately familiar with the issue and the dynamics which led to the compromise bill. I have also discussed the measure with Marilyn Showalter and Joe Taller.

Your affirmative action on SSB 3244 will be very much appreciated. If you have any reservations or questions, we will be pleased to answer them. Thank you for your consideration.

Very truly yours,



William T. Robinson

cc: Jared Blum, Vice Pres./General Counsel, Direct Selling Assoc.
Senator Eleanor Lee

B-15

JOHN SPELLMAN
Governor



KAREN RAHM
Director

STATE OF WASHINGTON
PLANNING & COMMUNITY AFFAIRS AGENCY

Ninth & Columbia Building, MS/GH51 • Olympia, Washington 98504 • (206) 753-2200

May 25, 1983

TO: Marilyn Showalter
Legal Counsel to the Governor

FROM: Karen Rahm *KR*

SUBJECT: SSB 3244 (Excise Taxes)

Recommendation: Sign (Executive Request Legislation)

Comments:

The first three sections of this bill were introduced as executive request legislation. The bill amends several provisions of RCW 82.04, a chapter dealing with the business and occupation tax. Section 1 of the bill clarifies the exemption of public funds received by nonprofit health and social welfare organizations. One addition to the existing legislation specifically includes community action councils among health and social welfare organizations. Other additions specifically exempt programs that provide assistance for weatherization and home repair for low income residences, home heating payment assistance, and community services designed to impact causes of poverty.

Section 2 exempts federal grants to the state and local jurisdictions from business and occupation tax levies. Section 3 exempts local jurisdiction revenues generally from the collection of business and occupation taxes. It also specifies that the Legislature may impose a business and occupation tax on any specific local jurisdiction activity.

The House Committee on Ways and Means amended the bill to add Section 4, which amends provisions of RCW 82.04 dealing with meat packers and direct sales personnel. We have no recommendations on that section.

Sections 1 through 3 of SSB 3244 are valuable additions to RCW 82.04 for local jurisdictions and nonprofit health and social welfare programs. These amendments will enable the affected programs to get maximum benefit from the public funds that are involved.

The Association of Washington Cities, the Washington State Association of Counties and the Washington State Community Action Agency Directors' Association have also supported Sections 1 through 3 of this legislation. We recommend that the Governor approve those Sections of SSB 3244.

KR:nj

B-16

*ackd
6/1/83*

DIRECT SELLING ASSOCIATION

1730 M Street, N.W., Suite 610, Washington, DC 20036
202/293-5760 • 202/466-5760
TWX 7108229283 Cable: USDSA

May 27, 1983

The Honorable John Spellman
Legislative Building
Olympia, WA 98504

Dear Governor Spellman:

I am writing on behalf of the Direct Selling Association (DSA) to urge your support of Substitute Senate Bill No. 3244, as amended, which will once and for all clarify what it means to be "doing business" in Washington.

By way of background, DSA is the national trade association which represents 140 leading companies that manufacture consumer products sold primarily in the home by more than four million self-employed individuals across the country, with more than 60,000 direct sellers in Washington. A great majority of our member companies are small business concerns, with the typical company having annual sales in the three to five million dollar range. There are substantially fewer large companies, with only a dozen or so having sales above 100 million, including Mary Kay Cosmetics, Inc. and Shaklee Corporation.

Other than a hand-full of member companies which have employees in the state and who would therefore by definition be "doing business" in the state, almost every other DSA member company has no employees, offices, warehouses, inventory or property in Washington. Nonetheless, the Department of Revenue has heretofore assessed a wholesale business and occupation tax against these out-of-state direct selling companies essentially because consumer products manufactured by these companies are sold in Washington by self-employed individuals who already individually pay a retail and service business and occupation tax.

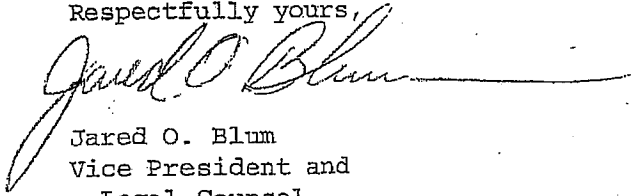
In keeping with the resolution of the Joint House and Senate Agency Rules Review Committee, Substitute Senate Bill No. 3244 defines the parameters of what it means to "do business" in such a way as to conform the state law with that of its sister states and in a manner which accords with applicable Supreme Court decisions. Under the terms of the bill the 60,000 or so direct sellers in Washington will properly be subject to a retail business and occupation tax but the out of state manufacturers will for the first time have clear guidelines as to what activities will result in a wholesale business and occupation tax liability.

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The Honorable John Spellman
May 27, 1983.
Page 2

Given the fact that Substitute Senate Bill No. 3244 represents a workable compromise of a long standing legislative issue, I request your support of this worthy measure.

Respectfully yours,

A handwritten signature in cursive script, reading "Jared O. Blum", followed by a horizontal line.

Jared O. Blum
Vice President and
Legal Counsel

wjm

B-18

JOHN SPELLMAN
Governor



DONALD R. BURROWS
Director

STATE OF WASHINGTON
DEPARTMENT OF REVENUE
Olympia, Washington 98504 MS-AX-02

OFFICE OF THE GOVERNOR
CORRESPONDENCE DISTRIBUTION
ORIGINAL: Shure
ACTION: GOV
XC'S: _____

DATE: 6-7-83

DATE: June 6, 1983

TO: The Honorable John Spellman
Governor

FROM: Donald R. Burrows, Director
Department of Revenue

RE: Recommendation for Veto - Substitute Senate Bill 3244

Summary & Recommendation

This bill establishes several new exemptions from state business and occupation tax and modifies an existing preferential rate. With the exception of the new B&O exemption provided to "direct sellers" in Section 5 of the Act, I recommend that you approve this bill.

A detailed explanation of each of the provisions of the bill is contained below. The first exemption, a B&O exemption for non-profit health or social welfare organizations, was an Executive Request measure. The second exemption, an exemption from the B&O tax for governmental grants received by local governments, is essentially an extension of the same type of exemption granted to social welfare organizations. The third exemption, an exemption from the B&O tax for local governments with respect to all income received except for enterprise or utility-type revenues, clears up an uncertain area of tax law. The fourth exemption, which abolishes the preferential B&O rate for retail meat processors, was a Departmental Request bill and was also included in SHB 72.

All of the above listed exemptions are clearly justifiable as a matter of tax policy. They present no insurmountable administrative problems. For these reasons, I would recommend approval.

The remaining exemption, an exemption from the B&O tax for out-of-state manufacturers who sell into Washington through "direct selling" schemes has little, if any, justification as a matter of tax policy. The bill provides an exemption from wholesaling and retailing B&O for out-of-state manufacturers who make sales in Washington exclusively through the "direct selling scheme". In order to be exempt,

(continued)

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The Honorable John Spellman
June 6, 1983
Page 2

the taxpayer cannot have employees located in the state, own or lease property in the state, or maintain a stock of goods in this state. The bill would apply to certain "direct sellers" who fit this category, e.g., Mary Kay Cosmetics and Shaklee. It would not, however, apply to others who have employees in this state or a stock of goods, e.g., Avon Products and Amway.

The bill was heavily lobbied in conjunction with a bill sponsored by the Seattle Trade Center merchants, which would have exempted all out-of-state manufacturers who do not have employees, property or a stock of goods in this state. Because of the fiscal impact of exempting all out-of-state manufacturers, the legislature apparently decided to provide relief only to the "direct seller" category.

The major justification advanced on behalf of the bill was that it would clarify the state's taxing jurisdiction over these out-of-state manufacturers, thus bringing stability and predictability to the conduct of their business in Washington. This justification exists. There are uncertainties in the area of whether this state has the jurisdiction, consistent with the Due Process clause, to impose the B&O tax on out-of-state manufacturers who do not have employees or property in this state. In recent years, the U.S. Supreme Court has greatly expanded the jurisdictional reach of state taxing power. Where it will end no one knows at this time. This uncertainty is compounded by the fact that "direct selling" is a relatively new form of doing business. There is not a lot of case law in the area.

Other than the uncertainty argument, there are no justifications. Washington provides a market for these manufacturers at considerable governmental expense. The Tax Advisory Council, which addressed the issue, stated in its report at page 52:

"The Council believes that the total exemption urged by the out-of-state sellers would be inequitable: the sellers take advantage of the market available here, and they ought to contribute to the services which support those markets."

The Tax Advisory Council recommended that the B&O rate on these taxpayers be reduced by 50% in recognition of the fact that less use is made of state services than instate businesses.

The tax exemption will not encourage new business activity in this state. The lack of a tax exemption will not drive existing business out-of-state. Indeed, if any business leaves the state, it will be businesses who will move their employees and stocks of goods to Portland in order to take advantage of the tax exemption.

(continued)

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The Honorable John Spellman
June 6, 1983
Page 3

The fiscal impact of the exemption is expected to result in a net loss of \$1.2 million in B&O tax revenues for the 83-85 biennium.

For the foregoing reasons, I recommend that you veto Section 5 of the bill.

Finally, I strongly recommend that you veto Subsection (3) of Section 5, if possible to do so as a legal matter. This subsection is intended to protect out-of-state direct sellers currently undergoing audit for past periods from the argument that the legislature intended to tax them prior to the enactment of their exemption. In other words, it is possible that a court would construe this as an attempt to give retroactive effect to the exemption. This would exacerbate the fiscal impact because businesses which have been paying the tax could seek refunds back to January 1, 1979. The amount has been estimated to be approximately \$2 million. Prior to the enactment of this exemption, there was no legislative exemption other than an exemption for business activities which the state could not tax as a matter of federal constitutional law.

The following is a more detailed analysis of each of the provisions in the bill.

Nonprofit Social Welfare Organizations

Section 1 of the bill expands the B&O tax exemption originally established in 1979 for nonprofit health or social welfare organizations. The existing law provides a deduction for governmental grants received by such organizations which are used in conducting special programs, including certain health care services, programs to combat juvenile delinquency, provision of care for orphans, employment programs, and legal aid for the indigent. This bill expands the deduction to include grants used to provide weatherization assistance and minor home repairs for low-income homeowners or renters; assistance to low-income households for home heating costs; and general programs to alleviate poverty. Further, the bill provides that community action councils be included in the types of nonprofit groups which may claim such deductions.

In many cases, the nonprofit organizations that receive the grants contract with other groups or business to actually perform the social or health service. The contractors remain subject to B&O tax on the income they receive. However, there has been the potential for B&O tax liability on the part of the nonprofit organization itself on the amount of the grant. This bill removes that possibility in the instances listed above. Since little or no B&O tax has actually been paid by such nonprofit groups, the impact of Section 1 is minimal in terms of actually budgeted revenues. This provision was an Executive Request measure.

(continued)

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Grants Received by Local Government

Section 2 of the bill provides a blanket exemption from B&O tax for any municipal corporation or political subdivision of the state on income received from the state or federal government in the form of grants. There are no restrictions on the use of such grants funds. There has been the potential for B&O tax liability on the part of local government for such grants, but little or no tax has actually been reported in the past. Accordingly, the impact is considered minimal.

General Exemption for Local Government

The third section of SSB 3244 provides an even broader B&O tax exemption for local government by completely exempting any county, city, town, school district, or fire district from state B&O tax, except for utility or enterprise activities as defined by the state auditor. The exemption pertains to any source of income received by these jurisdictions, regardless of the method of financing. The legislature specifically reserves the right to tax on a prospective basis certain activities or income sources of local government in the future.

Most state excise tax that has been previously paid by local jurisdictions reflects utility income subject to public utility tax (e.g., power, water and garbage service). Such income is not affected by this bill. But this exemption will preclude taxation of income received by one local jurisdiction which represent charges for services rendered to other units. The estimated impact of the B&O tax exemption for general local government activities is a state general fund loss of \$240,000 for the 1983-85 biennium.

Meat Wholesalers

The fourth section of the bill restricts the utilization of a preferential B&O tax rate concerning meat processors. Currently, slaughterers and processors of perishable meat products are taxed at 0.33 percent instead of the 0.44 percent general B&O tax rate (both excluding surtaxes). This amendment provides that only firms which sell the meat at wholesale may obtain the preferential tax rate. Accordingly, retail grocery stores and restaurants which process their own meat will be subject to the B&O retailing category on their sales of such products to consumers. The effect of this limitation is projected to yield additional state revenues of \$609,100 for the 1983-85 biennium. (NOTE: This provision was also included in SHB 72.)

(continued)

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The Honorable John Spellman
June 6, 1983
Page 5

Exemption for Direct Sellers

Section 5 of SSB 3244 establishes a new exemption from B&O tax for firms located in other states which make retail or wholesale sales in Washington exclusively through the use of direct seller's representatives. To be exempt from B&O tax the firm must not own or lease real property or maintain a stock of goods for sale in Washington and must not be incorporated in this state. Direct seller's representatives are defined as persons who make sales of consumer products in this state on behalf of the firm on a buy-sell basis or a deposit-commission basis and not on the basis of actual employment by the firm (e.g., compensation on the basis of number of hours worked). Further, such sales must not be solicited from a permanent retail establishment.

This exemption will apply to businesses represented by door-to-door salesmen and agents who demonstrate products in the home. The representatives will remain subject to B&O tax on their commissions or other compensation they receive. Also they will remain liable for collection of retail sales tax on any sales of taxable tangible personal property sold in this state. The estimated effect of the exemption is a reduction in state B&O tax of \$1.19 million for the ensuing biennium.

DRB:pg

cc: Steve Excell

B-23

FINAL LEGISLATIVE BILL REPORT

SSE 3244

BY Senate Committee on Ways and Means (Originally sponsored by Senators Thompson, Jones, Bauer, Bluechel, Fuller, Granlund and Bender) (By Governor Spellman Request)

Modifying provisions on excise taxes.

SENATE COMMITTEE on Ways and Means

HOUSE COMMITTEE on Ways and Means

SYNOPSIS AS PASSED LEGISLATURE E1

BACKGROUND:

Unless specifically exempted by law, health or social welfare organizations, community action councils and municipal corporations or political subdivisions of the state are subject to the B&O tax on grants or income they receive from any source.

A B&O tax of 0.33 percent is paid by meat processors and meat wholesalers. Under the current definition of meat processing, certain retailers of meat products who perform "processing" activities can qualify for this reduced B&O tax rate (as opposed to 0.44 percent).

Businesses located outside the state which make sales in this state through a direct seller's representative may or may not (depending on court decisions) be subject to this state's B&O tax.

SUMMARY:

Health or social welfare organizations, including community action councils, performing specified services are exempt from the B&O tax. These services include weatherization assistance or minor home repair for low income homeowners or renters; energy assistance for low income homeowners or renters; and community services to low income families or groups.

Grants received by municipal corporations or political subdivisions of the state from the state or federal government are exempt from the B&O tax.

Local jurisdictions are exempt from the B&O tax except for utility or enterprise activities.

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The special B&O tax rate of 0.33 percent specifically applies solely to meat processors and meat wholesalers and not meat retailers. Meat retailers will pay a tax of 0.44 percent.

Business activities "within this state" is redefined so that a person would be subject to retailing or wholesaling B&O tax only if that person (firm) (a) owns or leases real property within Washington State, (b) regularly maintains a stock of tangible personal property in this state for sale in the ordinary course of business, (c) is not a corporation in this state, and (d) makes sales exclusively through a direct seller's representative.

Revenue: An exemption for community service activities from the B&O tax is provided. An exemption for local units of government on governmental activities from the B&O tax is provided. The B&O tax on meat retailers is clarified (at 0.44 percent). An exemption for direct sellers from the B&O tax is provided.

VOTES ON FINAL PASSAGE:

Regular Session
Senate 46 1

First Special Session
Senate 43 1
House 95 0 (House amended)
Senate 38 8 (Senate concurred)

B-25

Add a new section to Chapter 82.04 RCW to read:

(1) This chapter shall ~~not~~ apply to any person in respect to gross income derived from the business of making sales at wholesale or retail if such person:

could include
with
3909

- (a) Does not own or lease real property within this state; and
- (b) Does not regularly maintain a stock of tangible personal property in this state for sale in the ordinary course of business; and
- (c) Is not a corporation incorporated under the laws of this state; and
- (d) Makes sales exclusively to or through a direct seller's representative in this state.

(2). For purposes of this section, the term "direct* seller's representative" means a person who buys consumer products on a buy-sell basis or a deposit-commission basis for resale, by the buyer or any other person, in the home or otherwise than in a permanent retail establishment, ~~or~~ who sells, or solicits the sale of, consumer products in the home or otherwise than in a permanent retail establishment; and

- (a) Substantially all of the remuneration paid to such person, whether or not paid in cash, for the performance of services described in this subsection is directly related to sales or other output, including the performance of services, rather than the number of hours worked; and
- (b) The services performed by the person are performed pursuant to a written contract between such person and the person for whom the services are performed and such contract provides that the person will not be treated as an employee with respect to such purposes for federal tax purposes.

TO: SE
From: RAS



FYI

State of Washington

JOHN SPELLMAN, Governor

April 15, 1983

OFFICE OF THE GOVERNOR

The Honorable Dan Grimm
Washington State Representative
415 House Office Building
Olympia, Washington 98504

Dear Representative Grimm:

Substitute Senate Bill 3244 has passed Third Reading in the Senate and has been referred to the House Ways and Means Committee. Passage of this bill will clarify an important public policy issue, that of local municipalities and political subdivisions being liable for Business and Occupation tax on grants received from the state or Federal government. It will also amend existing statute to ensure that weatherization, low-income home energy assistance, and community services block grant funds received by specified nonprofit organizations and expended on behalf of low-income and elderly persons are not subject to the B&O tax.

Additionally, it will exempt those non-proprietary activities carried out by local jurisdictions, i.e. fees charged for fingerprinting, from the B&O tax.

With the exception of non-proprietary fees, none of these activities are being taxed at this time, although notice has been given to several cities, and to some of the nonprofit organizations, that the activities are indeed subject to B&O tax under current law.

Your assistance in passage of this bill would be appreciated.

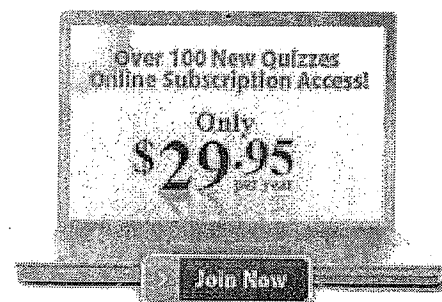
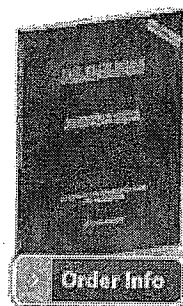
Sincerely,

Rollie Schmitten
Deputy Chief of Staff,
Legislative Affairs

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THE BLUE BOOK

OF GRAMMAR AND PUNCTUATION


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Who vs. Which vs. That

[Grammar Table of Contents:](#)

Rule 1 *Who* refers to people. *That* and *which* refer to groups or things.

Examples *Anya is the one **who** rescued the bird*

*Lokua is on the team **that** won first place*

*She belongs to an organization **that** specializes in saving endangered species.*

Rule 2 *That* introduces essential clauses while *which* introduces nonessential clauses.

Examples *I do not trust editorials **that** claim racial differences in intelligence.*

*We would not know which editorials were being discussed without the **that** clause.*

*The editorial claiming racial differences in intelligence, **which** appeared in the Sunday newspaper, upset me.*

*The editorial is already identified. Therefore, **which** begins a nonessential clause.*

NOTE Essential clauses do not have commas surrounding them while nonessential clauses do contain commas.

Rule 3 If *this*, *that*, *these*, or *those* has already introduced an essential clause, use *which* to introduce the next clause, whether it is essential or nonessential.

Examples ***That** is a decision **which** you must live with for the rest of your life.*

***Those** ideas, **which** we've discussed thoroughly enough, do not need to be addressed again.*

NOTE Often, you can streamline your sentence by leaving out *which*.

Example ***Those** ideas, **which** we have discussed thoroughly, do not need to be addressed again.*

Better *The ideas we have discussed thoroughly do not need to be*

C-1

addressed again.

Example **That** is a decision **which** you must live with for the rest of your life.

Better **That** is a decision you must live with for the rest of your life.
or
You must live with **that** decision for the rest of your life.

Are you ready for the quiz?

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NO. 35733-0-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

DOT FOODS, INC.,

Appellant,

v.

DEPARTMENT OF REVENUE,
STATE OF WASHINGTON,

Respondent.

DECLARATION OF
SERVICE

FILED
COURT OF APPEALS
DIVISION II
07 AUG 31 PM 3:30
STATE OF WASHINGTON
BY [Signature]
DEPUTY

I, Kristin D. Jensen, state and declare as follows:

I am a citizen of the United States of America and over 18 years of age and not a party to this action. On August 31, 2007, I provided a true and correct copy of RESPONDENT DEPARTMENT OF REVENUE'S ANSWER TO MEMORANDUM OF AMICUS CURIAE URM STORES, INC. and this DECLARATION OF SERVICE to be served via U.S. mail (through Consolidated Mail Services), with proper postage affixed to:

Jacquelyn A. Beatty
Karr Tuttle Campbell
1201 Third Avenue, Suite 2900
Seattle, WA 98101-3028

and


Howard M. Goodfriend
Edwards Sieh Smith & Goodfriend PS
1109 First Avenue, Suite 500
Seattle, WA 98101

and

Dirk Giseburt
Davis Wright Tremaine LLP
Suite 2200
1201 3rd Avenue
Seattle, WA 98101-3045

I declare under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

Executed this 31st day of August, 2007, in Olympia, Washington.


Kristin D. Jensen, Legal Assistant